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CROWELL & MORING LLP
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2595
(202) 624-2500
FACSIMILE (202) 628-5116

SUITE 1200
2010 MAIN STREET
IRVINE, CALIFORNIA 92614
(714) 263-8400
FACSIMILE (714) 263-8414

180 FLEET STREET
LONDON EC4A 2HD
44-171-413-0011
FACSIMILE 44-171-413-0333

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May 6, 1997

BY HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

ORIGINAL

Re: In re Petition of MCI for Declaratory Ruling
CCBPol 97-4; CC Docket No. 96-98

Dear Mr. Caton:

Transmitted herewith for filing with the Commission on behalf of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell, are an original and twelve copies of reply comments in the above-referenced proceeding. As directed in the March 14, 1997, Public Notice, copies of these comments are also being sent to Janice Myles, Common Carrier Bureau, and ITS, Inc., as indicated in the attached Certificate of Service.

Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,

Jacqueline E. Davis

Jacqueline E. Davis

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	File No. CCBPol 97-4;
Petition of MCI for Declaratory Ruling	)	CC Docket No. 96-98

ORIGINAL

REPLY COMMENTS OF SBC COMMUNICATIONS INC., SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL AND NEVADA BELL

JAMES D. ELLIS
175 E. Houston, Room 1254
San Antonio, TX 78205

MARTIN E. GRAMBOW
1401 I Street, N.W., Suite 1000
Washington, DC 20005

Attorneys for
SBC COMMUNICATIONS INC.

Of Counsel:
JOHN I. STEWART, JR.
CROWELL & MORING LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004

ROBERT M. LYNCH
DURWARD D. DUPRE
MICHAEL J. ZPEVAK
HARLIE D. FROST
One Bell Center, Suite 3520
St. Louis, MO 63101

Attorneys for
SOUTHWESTERN BELL TELEPHONE COMPANY

RANDALL E. CAPE
140 New Montgomery Street, Room 1517
San Francisco, CA 94105

Attorney for
PACIFIC BELL and NEVADA BELL

May 6, 1997

SUMMARY

SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (the "SBC Companies") file these Reply Comments in response to the initial comments filed by various other parties in this proceeding.

Virtually all of the commenting parties ultimately agree or concede that intellectual property rights of third parties may be infringed by CLEC use of unbundled network elements in some circumstances. In particular, the vendor commenters -- those "third parties" whose rights are at issue -- confirm that providing access to unbundled network elements raises a bona fide concern of potential intellectual property infringement.

Private negotiations between CLECs and vendors of any intellectual property issue that might exist on a case-by-case basis is a workable solution to the intellectual property problem. The vendor commenters have emphasized that they will engage in such negotiations in good faith, and there is no evidence in this record to support the competing carrier parties' speculative assertions that such good faith negotiations will not take place, or cannot be successful. Moreover, the vendor commenters have confirmed that a system of <u>ILEC</u> negotiation on behalf of CLECs would be ineffective and unsuccessful. ILECs would not have the requisite knowledge to obtain the rights needed by the CLECs, and vendors must have privity of contract with the CLECs themselves in order to license and protect their works effectively.

Only with a system that recognizes the CLEC's responsibility to negotiate directly for the rights it needs can the Commission insure that only those rights that are required to be cleared will be cleared, and that the parties with the best information and incentives will control the negotiation process. The competing carrier parties' speculative arguments that such a system would result in undue burdens on CLECs or would violate the Communications Act are wrong both as a matter of law and policy.

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Before the
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Declaratory Ruling	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.,
SOUTHWESTERN BELL TELEPHONE COMPANY,
PACIFIC BELL AND NEVADA BELL

SBC Communications Inc. ("SBC"), Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell (collectively "the SBC Companies") file these Reply Comments in response to the comments filed by various other parties in this proceeding on April 15, 1997.

The issues in this proceeding arise because of the operation of the intellectual property laws and the effects of legal rights of unregulated companies. Such matters are generally outside the Commission's jurisdiction, and the respective rights of owners and users of that intellectual property will ultimately be determined, if necessary, by the courts. The Commission should focus whatever action it takes in this proceeding on setting up a framework for the private resolution of intellectual property rights.

There is a consensus among most of the commenting parties that third party intellectual property rights may be infringed when CLECs use unbundled network elements. Whether such rights are infringed by any particular proposed use, however, is a complex question that can only be resolved on the basis of the specific facts and a particularized application of the intellectual property laws.

This is a problem, however, for which there is a workable solution. A procedural framework within which CLECs may be required to obtain any intellectual property licenses or right-to-use agreements from third parties that are necessitated by their particular proposed use of an unbundled element would assure that only those rights that are required to be cleared will be cleared, and that the parties with the best information and incentives will control the negotiation process. The SBC Companies view third party intellectual property rights not as a bar to CLECs' use of unbundled network elements, but as a practical prerequisite that must be resolved -- and can be resolved -- as part of their lawful use of those elements.

I. POTENTIAL INTELLECTUAL PROPERTY INFRINGEMENT RESULTING FROM CLEC USE OF UNBUNDLED NETWORK ELEMENTS IS A MATTER OF BONA FIDE CONCERN.

As the SBC Companies explained at length in their opening comments, intellectual property rights of third parties are implicated when CLECs use ILECs' unbundled network elements. See Comments of SBC Communication Inc., Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell ("SBC Comments") at 3-12, Milgrim Aff. at ¶¶ 18-21. The question of whether infringement would occur in a particular case must be determined on the basis of the particular use being engaged in by the CLEC, its own network design and operations, and the rights held by and/or reserved by the particular third party vendor. Id. at 11-12, 20. It may be that for a particular CLEC, the elements as to which additional intellectual property licenses are necessary will be few (or even zero), but there is a bona fide question under intellectual property law that should be considered by each CLEC.

Virtually all of the commenting parties agree that, depending on the circumstances, the intellectual property rights of third parties will have to be cleared.[1] The competing carrier parties (AT&T, Sprint, LCI, CompTel, and the Telecommunications Resellers Association) devote much of their comments to arguments that ILECs have raised the intellectual property issue only as a pretext, and that it should thus be ignored.[2] But even several of them concede, as

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[1] See BellSouth Comments at 4-5; Comments of Bell Atlantic and NYNEX at 5; Opposition of GTE Service Corporation to MCI Petition for Declaratory Ruling ("GTE Comments") at 4-6; Comments of the Public Utility Commission of Texas on the Petition of MCI ("PUCT Comments") at 3; Bellcore's Opposition to MCI's Petition for Declaratory Ruling ("Bellcore Comments") at 2; Comments of Northern Telecom Inc. ("Nortel Comments") at 1, 4-7; Comments of Lucent Technologies Inc. ("Lucent Comments") at 2-5; Comments of Ad Hoc Coalition of Telecommunications Manufacturing Companies ("Coalition Comments") at 2-3.

[2] The reasons they suggest for viewing ILEC positions with skepticism (see, e.g., AT&T Comments at 18-28) are an irrelevant diversion. The SBC Companies are seeking to assure that if use of unbundled network elements would violate intellectual property rights, that use will be properly licensed. To the extent intellectual property rights would not be violated or infringed, the competing carriers' arguments become moot. For example, AT&T describes an instance in which NYNEX and Ameritech offered switching ports along with access to vertical elements that they themselves were apparently authorized to use. AT&T Comments at 23. But as AT&T relates, the proposal had been reviewed by the switch vendor, Nortel, and it had approved. Id. at 23-24. As confirmed by Nortel's own comments, this case-by-case approach will allow the protection of vendors' intellectual property rights and result in additional licensing only where

indeed they must under intellectual property law, that the acquisition of additional intellectual property rights from third parties may be necessary for a CLEC to use unbundled network elements in some circumstances.[3]

The comments of the vendors themselves confirm that a bona fide issue exists. Nortel explains that a CLEC's "access to the vendor's equipment, software, and/or proprietary information" raises concerns about the vendor's intellectual

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necessary. See Nortel Comments at 7.

In any event, AT&T's pejorative descriptions of SBC's motivations are false or misleading. For example, it states that SWBT "has refused to provide copies of its licensing agreements." AT&T Comments at 2. But SWBT provided identifying information about the agreements and vendors, and is precluded from disclosing agreement terms themselves, as AT&T well knows: it was a codefendant with SWBT in a 1996 suit by Nortel in Texas state court to enjoin the disclosure of confidential proprietary information in a Texas case, and to order AT&T to return or destroy all copies of such information in its possession.

AT&T misrepresents "testimony" in a Texas PUC arbitration proceeding. See AT&T Comments at 4 & n.4. The quoted statement was made by counsel in answer to a question from the Chairman, and was followed immediately by a statement that the next preference was for competitors using unbundled loops and a further statement by co-counsel that, given the requirements of the Act, "of course we want to see a proper balancing or incentive such that there's some facilities-based competition. It gives customers a true choice. We recognize that." Application of AT&T Communications of the Southwest, Inc. for Compulsory Arbitration to Establish an Interconnection Agreement between AT&T and SWBT, PUCT Docket No. 16226, Tr. at 4438.

[3] See Comments of AT&T Corp. ("AT&T Comments") at 2 ("[N]either AT&T nor anyone else can say for certain that all such claims are necessarily unfounded."); Comments of Sprint at 5 ("It is, of course, possible" that existing license agreements would not cover CLEC use, although "Sprint believes that generally few agreements would be implicated"); Comments of the Telecommunications Resellers Association in Support of Petition of MCI for Declaratory Ruling ("TRA Comments") at 3 (in "rare circumstances" intellectual property may be implicated).

property rights. Nortel Comments at 6. Such concerns arise when the CLEC is to be given "physical, electronic, or other access," where equipment or software is to be modified in order to accommodate the CLEC's use, or where confidential or proprietary information is to be disclosed. See id. at 5-6. Nortel makes the same point the SBC Companies made in their initial comments -- that intellectual property issues will not be raised in every situation, but that when the equipment vendor's rights are implicated because of the nature of the CLEC's particular use and the scope of the vendor's particular rights, an additional license or right-to-use agreement must be negotiated. Id. at 6-7.

Lucent agrees that no "absolute general statement [may be made] regarding the need for additional license agreements vis-a-vis unbundling or resale of services by CLECs." Lucent Comments at 2-3. It goes on, however, to provide examples of situations that, in its view, would require additional licenses, including use of software beyond a certain capacity specified in the license agreement, use of a software development platform by a CLEC to develop its own applications, or CLEC use of unbundled network elements in combination with its own network or elements obtained from third parties other than the ILEC and its vendor. Id. at 4-5.

Bellcore confirms that network elements often consist of or incorporate software that is licensed by a third party.[4] Such licensing "is common in both the

[4] See also Coalition Comments at 3 ("manufacturers often retain property rights in the products they sell to LECs.").

telecommunications and computer industries and long predates the Act." Id. Bellcore also confirms the intellectual property principle that "where physical 'control' of the IP resides is irrelevant to whether the IP owner's rights have been violated by an entity's use of such IP rights without the IP owner's permission." Id. at 3.

The Act itself imposes a general duty on every telecommunications carrier to "protect the confidentiality of proprietary information of, and relating to, . . . equipment manufacturers." 47 U.S.C §222(a). In the commercial world, this duty is made specific and adapted to particular circumstances through the license agreements the vendors enter with their customers and licensees. Ordering CLEC access to confidential information without requiring the CLEC to enter a direct agreement to protect the vendor's interests would result in violations of both the terms of specific vendor contracts with ILECs and the general duty imposed by Section 222(a).

As the SBC Companies stated in their initial comments, and as the other commenting parties generally agree, additional intellectual property licenses may not be necessary for all or even most uses by CLECs of unbundled network elements. But a serious intellectual property law question of whether an additional license is necessary in a particular case must be determined in light of the particular use contemplated by the CLEC and the scope of the particular rights held by the third party. The arguments of AT&T, Sprint, CompTel, TRA, and LCI that ILECs have raised intellectual property issues as a mere pretext should be rejected. The clearance of third party intellectual property rights necessitated by CLEC use of unbundled network elements can and should be resolved by private negotiations on a case-by-case basis.

II. THE COMMISSION SHOULD REQUIRE THE CLEC, NOT THE ILEC, TO OBTAIN ANY ADDITIONAL RIGHTS THAT MAY BE NECESSARY.

The goal of the SBC Companies is not to preclude or delay CLEC use of unbundled network elements, but to assure that only properly licensed use occurs. If a CLEC were to engage in unauthorized use, there could be a risk of contributory infringement liability for the SBC Companies. The Commission cannot eliminate that risk by issuing the broad declaratory ruling MCI requests, since it does not have the jurisdiction to determine intellectual property rights, and the record of this proceeding would not in any case support a ruling that no use of unbundled network elements by any CLEC would ever raise any intellectual property issue. But the Commission can reduce the risk of potential liability -- and properly accommodate the intellectual property rights of non-regulated parties -- by requiring the CLECs to obtain all intellectual property licenses and right-to-use agreements necessitated by their proposed use.

A. The Arguments That CLECs Should Not Be Required to Obtain Any Necessary Rights Are Speculative and Unpersuasive.

Several commenters seek to support MCI's assertion that a requirement that CLECs obtain additional intellectual property rights is unduly burdensome or is discriminatory. Their arguments consist primarily of pejorative characterizations of ILEC motives and speculative assertions about the outcome of CLEC negotiations.

It is interesting to note that AT&T's arguments are based on speculation alone. See AT&T Comments at 13-16. It argues, for example, that CLECs "will have no purchasing or bargaining power with the incumbent LECs' vendors remotely comparable to that enjoyed by the incumbent LEC as a result of the volumes of business it controls," id. at 13; that the CLEC will "be (at best) subject to economic exploitation as the vendor's captive customer, and (at worst) simply refused a license from vendors that desire to please the incumbent LECs by precluding competition with them," id. at 14; that a CLEC "would pay a discriminatorily higher price for any intellectual property licenses," id; and that the process of negotiating with vendors "could be an impossible situation for new entrants," id. at 15. Yet AT&T received information about potentially applicable vendors under its Texas interconnection agreement with Southwestern Bell Telephone Company in early December 1996. If AT&T has contacted any of those vendors over the past five months, it should have described its actual experiences in that regard rather than engaging in speculation about obstacles that might arise because of the supposed incentives of vendors to delay or to extract discriminatory prices.

In fact, the vendors who have commented in this proceeding have clearly stated their intention to permit or, where necessary, to license CLECs' use of unbundled network elements. Lucent, for example, states that it "does not believe that additional license agreements or fees are necessarily required" for CLEC use of unbundled network elements. Lucent Comments at 2. But in situations where a CLEC's use is beyond the scope of or otherwise violates the original license, Lucent indicates its willingness to enter any necessary expanded or separate license. Id. at 6. Nortel also states that its intellectual property rights may not be implicated where use of an unbundled element does not involve physical, electronic, or other access by the CLEC to its equipment or software, and its other rights are not violated. Nortel Comments at 5-6. But where such rights become implicated, Nortel makes clear that it is "willing to work with either its customers or other requesting parties to accommodate their reasonable requests." Id. at 7.

The speculative arguments about undue burdens on CLECs are not only unsupported but insupportable. As the SBC Companies pointed out in their initial comments, large CLECs such as AT&T and MCI would likely have greater leverage than any ILEC. Moreover, even for a smaller CLEC, the fact that the proposed use is an incremental expansion of use of a network element that has already been sold and licensed, means that there is no reason to expect that significant leverage is necessary to induce a vendor to permit such use at a reasonable fee. And the proposed solution of the competing carrier parties -- that ILECs negotiate broad "one size fits all" agreements and split the cost equally among CLECs -- would radically penalize smaller CLECs with limited needs, who would have a greater ability to minimize their own costs by controlling their own license negotiations.

Several parties argue that the CLEC has no choice among vendors with respect to a particular network element, and thus will be forced to pay a higher price to use that element than an ILEC who purchased the element in the first place. See AT&T Comments at 13; Comments of LCI International Telecom Corp. ("LCI Comments") at 5.[5] But wholly apart from the likelihood that vendors would be willing (and eager) to license new customers on reasonable terms, the CLECs do have a choice. The provision of access to unbundled network elements is designed to permit a flexible approach by CLECs that promotes the development of innovative services and, ultimately, facilities-based competition. There is no requirement that a CLEC obtain a particular unbundled element from an ILEC rather than building or buying the element itself. The availability of such alternatives, combined with the natural incentive of any vendor to license further use at a fee that is acceptable to the new customer rather than not licensing it at all, should offset the speculative effect asserted by AT&T and LCI.

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[5] LCI also argues that CLECs would be subject to some sort of double payment, because they would pay a share of the cost of "embedded technology" for access, and then pay a separate fee directly to the intellectual property owner for their use of the element. LCI Comments at 9. But an ILEC's unbundled network element rates, when based on TELRIC pricing, would not include amounts for paid-up intellectual property licenses. If the license fee were usage-based, the CLEC would pay only for that portion attributable to its own use. Again, this is an issue that can only be resolved on a case-by-case basis, in light of the specific agreements and the CLEC's proposed use.

B. Imposing The Additional Licensing Obligation On ILECs Would Be Unworkable.

As the SBC Companies explained in their initial comments, the imposition of a requirement upon ILECs that they seek to license any and all additional rights needed for any CLEC use of unbundled network elements would be untenable. The comments of equipment manufacturers and vendors confirm that conclusion.

Bellcore, for example, explains that the ILEC cannot be required to license additional rights in place of the CLEC, because in some cases "the third-party owner needs direct contractual privity with each user of its IP and the right to enforce its IP rights against each user itself." Bellcore Comments at 3. As explained further by the SBC Companies in their initial comments, privity of contract between the vendor and the CLEC is necessary for the proper grant and enforcement of confidentiality protection for trade secrets, as well as warranties and indemnifications. SBC Comments at 26.

Similarly, Lucent confirms the patent law principle (also raised by the SBC Companies, SBC Comments at 5, Milgrim Aff. at ¶ 16) that "if a CLEC combines unbundled network elements of an incumbent with elements of its own network or elements obtained from third parties to form an infringing combination, a separate patent license agreement would be required." Lucent Comments at 5. This would also be the case if a CLEC offered "unbundled patented network features or functions in combination with resold services." Id. Indeed, LCI emphasizes that access to unbundled elements is "indispensable" because of the "freedom that CLECs will have to compete by combining unbundled elements with features that the ILEC does not offer or in making other adjustments to the total service package offered to the end user." LCI Comments at 3. As the SBC Companies had previously pointed out, see SBC Comments at 23-26, this means that only the CLEC -- which is privy to information about its own network elements acquired from other sources and its plans with respect to operations and services -- is in a position to identify and acquire the necessary patent rights.[6]

Although Nortel takes no position on whether the CLEC or the ILEC should negotiate with it for any necessary license agreements, it also states that

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[6] For this reason, AT&T's discussion of the "patent exhaustion" or "first sale" doctrine does not address all potential patent infringement issues. See AT&T Comments at 19-20. It is also questionable whether the doctrine even applies to all equipment in the network, but if it did, it would not be determinative of all patent rights potentially affected by unbundled access.

The doctrine stands for the proposition that the sale of an article by a patentee includes an implied license under the intellectual property held by the patentee. Thus, the sale is said to exhaust the patentee's rights in the product and place the product beyond the reach of the patent statutes. This is clearly the state of the law when the sale is made without an express license from the patentee. See Duplan Corp. v. Deering Milliken, Inc., 444 F. Supp. 648, 657 (D.S.C. 1977), aff'd, 594 F.2d 979 (4th Cir. 1979), cert. den., 444 U.S. 1015 (1980).

However, where the patentee expressly places conditions on the sale of the product, the first sale doctrine can be limited. Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 708 (Fed. Cir. 1992). Thus, to the extent any agreements ILECs have with equipment vendors contain express reservation of use rights, the first sale doctrine does not apply. The doctrine also may not apply, depending on the facts, to patent claims directed to a method patent rather than a patented apparatus. See Bandag, Inc. v. Al Boser's Tire Stores, 750 F.2d 903 (Fed. Cir. 1984). For these reasons as well, potential patent issues can be resolved only on a case-by-case basis.

performance specifications and indemnities made by Nortel may be voided if a CLEC uses the equipment or software in a manner not contemplated by the contract. Nortel Comments at 6. As the SBC Companies pointed out in their initial comments, see SBC Comments at 26, in order to receive the benefit of such specifications and indemnities itself, the CLEC would have to contract directly with the vendor.

Various competing carrier parties argue that ILECs are in a better position than CLECs to judge whether a CLEC's particular proposed use would violate a third party vendor's intellectual property rights. See AT&T Comments at 15; CompTel Comments at 3; LCI Comments at 6-7; Sprint Comments at 5-6. But that is not the case. Whether a particular CLEC's use would violate a third party's rights depends also on how and to what extent the element will be used as part of the CLEC's network. It is unlikely that the ILEC will be provided by the CLEC with sufficient information regarding its business plans to be able to assess the issue. In any case, the ultimate determination would be made by the third party intellectual property owner, which alone would decide whether to seek to enforce its rights.[7] Despite some commenters' suggestions to the contrary, the third party vendors are in no way under an ILEC's control. Thus, any discussion

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[7] The Commission should reject AT&T's remarkable argument, see AT&T Comments at 12, that the Communications Act somehow precludes an ILEC from requiring indemnification from a CLEC to protect the ILEC from contributory infringement or other liability caused by the CLEC's direct violation of a third party's intellectual property rights. There can be no justification whatsoever for such a rule.

of whether a particular use would be prohibited absent further authorization, and any negotiation of the price or other restrictions that would be acceptable as conditions for that authorization, can only be engaged in by the CLEC, which has its own confidential business plan in mind and its own economic interest at heart.

The concept that there could be a simple "single negotiation [by which an ILEC could] secure for all requesting carriers the ability to utilize the intellectual property or other proprietary information as part of a requested network element" (TRA Comments at 9) is implausible, if not impossible. How could an ILEC purchase, or be required to purchase, <u>all</u> potential rights for <u>all</u> potential users with respect to <u>all</u> network elements? To begin with, ILECs would not even be able to identify, and hence would be unable to describe, all potential uses, since such uses would, for example, encompass use of equipment in combination with other parts of CLECs' own networks. Moreover, the procurement of the broadest possible rights, some of which would turn out to be unneeded by the ILEC or any CLEC, would be wasteful indeed. <u>See</u> Nortel Comments at 6 n. 9. CLECs would no doubt resist being required to pay a portion of the cost of such necessarily overbroad rights.

The approach followed by the Texas PUC is designed sensibly to accommodate intellectual property concerns. The ILEC will, upon request from a CLEC, provide a list of vendors and contracts that may require licenses with respect to the particular unbundled network element being purchased. The ILEC does not make a determination that the CLEC's proposed use would or would not infringe intellectual property interests, but identifies the license agreements sufficiently for the CLEC to explore that issue with the vendor. The CLEC contacts the vendor directly and, based on a discussion of whatever information the CLEC may provide confidentially, determines whether a license is necessary and, if so, what the terms of that license should be. This system will assure that licenses are obtained where necessary, and that the burden on CLECs and the risk of potential liability for ILECs is minimized.

III. THE APPROACH OF THE COMPETING CARRIER PARTIES IS NOT SUPPORTED BY LAW OR POLICY.

The competing carrier parties argue that the imposition of an obligation on CLECs to obtain necessary intellectual property licenses would be a violation of the Communications Act. AT&T Comments at 10-16; CompTel Comments at 2-3; LCI Comments at 6-8; Sprint Comments at 3; TRA Comments at 3-4. That argument is insupportable as a matter of law and policy.

AT&T and TRA first argue that Section 251(d)(2) of the Act, as interpreted by the Commission in its First Report and Order in Docket 96-98, requires that ILECs provide access to unbundled elements without regard to third party intellectual property rights. AT&T Comments at 10; TRA Comments at 5-6. The ILECs are not, however, proposing to deny access to the unbundled elements, but only to require that any needed intellectual property rights be properly procured by the CLEC when access to those elements is provided. Section 251(d)(2) requires at most that the ILEC provide access to proprietary elements found necessary, not that it refrain from requiring the CLEC to clear third party intellectual property rights as part of that access. Any other reading of that section would impliedly grant to the FCC the authority to abrogate rights of unregulated parties subsisting under independent federal statutory law, contrary to Section 601(c)(1) of the Telecommunications Act of 1996 and to longstanding Supreme Court precedent. See TelePrompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394, 406 & n.11 (1974).

Similarly, the arguments of several competing carrier parties that a requirement that CLECs obtain necessary licenses would violate Section 251(c)(3) of the Act is insupportable. The theory is apparently that the rates, terms and/or conditions of access would be made somehow discriminatory by such a requirement. See, e.g., AT&T Comments at 10-11. But providing access to a network element subject to the CLEC's obtaining a license from the third party owner of intellectual property incorporated into the element is access "equal-in-quality to that which the incumbent LEC provides to itself," id., since the ILEC also must obtain a license in order to use the element.

AT&T also makes the speculative argument that the cost of a license obtained by the CLEC for itself will be greater than the cost of a license obtained for the CLEC by the ILEC, and that the result would be discriminatory. Id. at 13-16. For the reasons discussed above, AT&T's speculation is erroneous. There is no evidence that third party equipment vendors, who negotiate at arms length with ILECs, would act to thwart competing carriers. Indeed, the more competition there is in the local exchange markets, the more business an equipment vendor should expect.

The comments of the vendors in this proceeding confirm that they are willing freely to permit or, in what they expect to be limited circumstances, license, the use of their intellectual property by CLECs. For example, Nortel states that certain CLEC uses would require no further grant of rights, but where licensing is required, it "will take all necessary and reasonable steps to ensure that such contracts can be executed on as timely, and in as unburdensome, a manner as possible." Nortel Comments at 5-6, 9. Lucent states that it "believes that the Commission's goals [of promoting local competition and avoiding the placement of undue burdens on the entry of CLECs] can be attained without encroaching upon a vendor's rights in its intellectual property," by allowing licensing in the relatively limited circumstances in which it may be necessary. Lucent Comments at 5, 6.

TRA also argues that the Commission should rely on its findings in the Infrastructure Sharing Report and Order, CC Docket No. 96-237, FCC 97-36 (released February 7, 1997), to impose an obligation on ILECs to seek any necessary licenses on behalf of CLECs. But that Report and Order made clear that the requirements being imposed under Section 259 of the Act applied only to carriers that lacked economies of scale and scope and would not be acting as CLECs. See 47 CFR §§ 59.2(e), 59.4(1). Moreover, in the ultimate finding cited by TRA, the Commission imposes obligations to negotiate with third parties only "[i]n cases where the <u>only means available</u>" for sharing infrastructure is to seek such a license. <u>See</u> TRA Comments at 10 (emphasis added). In the case of CLEC access to unbundled network elements, by contrast, direct negotiation by the CLEC is not only an alternative means to accommodate the third party's intellectual property rights, it is itself the only feasible means to accomplish that result. As explained above, and in more detail in the SBC Companies' initial comments, putting ILECs into the role of agent or licensor to the CLEC would be completely unworkable. <u>See</u> SBC Comments at 21-27. <u>See also</u> "Petition for Reconsideration and Clarification of Southwestern Bell Telephone Company," Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, CC Docket No. 96-237 (filed April 3, 1997).

CONCLUSION

The Commission should deny MCI's request for a ruling either that no third party intellectual property rights are implicated by the provision of access to unbundled network elements, or that ILECs should be required to seek or obtain necessary third party licenses on behalf of a requesting CLEC. A framework that would recognize the responsibility of CLECs to obtain any intellectual property licenses or right-to-use agreements necessitated by their own use of unbundled network elements directly from the third party owners of such intellectual property would not violate the Act, and is the only feasible way to accomplish both the goal of assuring the provision of lawful access to unbundled elements and the proper accommodation of the independent legal rights of third parties.

Respectfully submitted,

SBC COMMUNICATIONS INC.

By: ______________________
James D. Ellis

175 E. Houston Street
San Antonio, Texas 78205
(210) 351-3300

By: ______________________
Martin E. Grambow

1401 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 326-8868

Attorneys for
SBC Communications Inc.

SOUTHWESTERN BELL TELEPHONE COMPANY

By: ______________________

Robert M. Lynch
Durward D. Dupre
Michael J. Zpevak
Harlie D. Frost

One Bell Center, Suite 3520
St. Louis, Missouri 63101
(314) 235-2507

Attorneys for
Southwestern Bell Telephone Company

PACIFIC BELL
NEVADA BELL

By: ______________________

Randall E. Cape

140 New Montgomery Street
Room 1517
San Francisco, California 94105
(415) 542-1167

Attorney for
Pacific Bell and Nevada Bell

Of Counsel:

John I. Stewart, Jr.
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

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